(2)

No. 90-983

In the Supreme Court of the United States

OCTOBER TERM, 1990

IRON WORKERS LOCAL 118, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Acting Deputy General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

STANLEY R. ZIRKIN
Deputy Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether the court of appeals properly concluded that petitioners were in civil contempt of the court's prior order enforcing an unfair labor practice decision of the National Labor Relations Board.

2. Whether the court of appeals properly imposed additional obligations, including an injunction against further violations and conditions assuring current and future compliance, to cure the effects of petitioners' contumacious conduct.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-983

IRON WORKERS LOCAL 118, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is unreported, but the decision is noted at 908 F.2d 977 (Table), and the report of the Special Master (Pet. App. 11a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1990, and a petition for rehearing was denied on September 19, 1990. Pet. App. 31a. The petition for a writ of certiorari was filed on December 18, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In July 1986, petitioner Local 118 picketed a state prison project at the Sierra Conservation Center near Jamestown, California. On April 21, 1987, the Board concluded that Local 118's picketing at that project had violated Section 8(b)(4)(i) and (ii)(B) of the Act, 29 U.S.C. 158(b)(4)(i) and (ii)(B), by unlawfully enmeshing neutral employers in Local 118's primary labor dispute with Arnold Welding, a non-union contractor. Pet. App. 11a-12a. Finding that Local 118 had a demonstrated proclivity to violate the National Labor Relations Act, the Board broadly prohibited Local 118, its officers, agents, and representatives from:

> Picketing at or near entrances to construction jobsites established and reserved for the use of neutral persons, their personnel, visitors, and suppliers, or in any other manner, or by any other means, inducing or encouraging any individual employed by any person engaged in commerce or in an industry affecting commerce, to engage in a strike or refusal in the course of his employment, to use, manufacture, process, transport, or otherwise handle or work on any articles, materials, or commodities, or to refuse to perform any other services, or coerce or restrain * * * any * * * person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force or require * * * any * * * person, to cease doing business with * * any other person.

Pet. App. 2a-3a. On October 29, 1987, the court of appeals summarily enforced the Board's order. *Id.* at 2a-3a, 32a-37a.

2. On October 6, 1987, F & H Construction, Inc. (F & H) entered into a contract with the State of

California to build certain support facilities at the same project involved in the 1986 labor dispute. Pet. App. 3a, 12a. On October 21, 1987, F & H, the general contractor on the site, entered into a subcontracting agreement with Ron Regan Construction Company (Regan) whereby Regan agreed to supply and erect six prefabricated metal buildings. Regan, in turn, subcontracted the erection work on the building to Ron Walker Construction Company (Walker). Neither Regan nor Walker had a collective bargaining agreement with Local 118. *Ibid.*

Upon learning that Regan had selected Walker to perform the erection work, petitioner Walt Turner, Local 118's business agent, warned Regan that there would be labor problems on the job because Walker was non-union. Pet. App. 3a, 13a, 23a. Local 118 applied for, and received, approval from the Building Trades Council to picket Walker. *Id.* at 4a, 14a, 23a. Meanwhile, F & H established a reserved gate system at the prison site. Gate No. 1 was reserved for the use of Regan, its employees, suppliers and customers, while Gate No. 2 was established for all others. *Id.* at 3a-4a, 14a. Until February 23, the gate signs did not mention Walker specifically. *Id.* at 14a, 17a. The location of the gates was changed on February 4, 1988, and Local 118 was so advised. *Id.* at 15a. On occasion, an unmarked gate at the back of the project was used by Walker's or Regan's suppliers. *Id.* at 17a.

On February 5, 1988, Local 118 picketed the site with signs that read "Ron Regan Unfair to Iron Workers," despite the fact that it knew its dispute was with Walker, not Regan. Pet. App. 4a, 5a, 23a. Local 118 picketed only Gate 2, and when an F & H official stated that Local 118 was picketing the wrong

gate, Cecil Atkinson (one of Local 118's pickets), at the apparent direction of business agent Turner, replied that Local 118 did not care—that it was going to picket there and shut F & H down. *Id.* at 16a. In a later conversation that same day, Turner reiterated to the F & H official that Local 118 intended to shut the job down. *Ibid.*

Local 118 discontinued picketing between February 6 and February 22, but resumed picketing on February 23. Sometime that morning, the gate sign at Gate 1 was changed explicitly to require both Regan and Walker, their employees, suppliers and subcontractors, to use that gate. The sign at Gate 2 was also changed explicitly to reflect Walker's required access through Gate 1 only. Nevertheless, Local 118 did not picket Gate 1 (except for a one-hour period on February 24) and continued to picket neutral Gate No. 2. In addition, the picket signs mentioned only Regan, not Walker. Pet. App. 5a, 16a.

3. The Board commenced civil contempt proceedings against petitioners, alleging that Local 118 and Turner violated the court of appeals' judgment prohibiting secondary conduct by making unlawful threats, by picketing at gates reserved for neutral employers, and by picketing with signs naming a neutral employer (Regan). The court of appeals designated a Special Master to hear evidence and make recommended findings of fact and conclusions of law. On September 27, 1989, the Master filed her report recommending that Local 118 and Turner be absolved of all charges of civil contempt. Pet. App. 11a-30a.

Although the Master found the facts set forth above, she concluded that the evidence did not establish contumacious conduct by clear and convincing evidence. Specifically, the Master concluded that al-

though Regan was "not a primary employer with whom the Union had a dispute" and "the Union had no right to picket Regan," the Union's picketing was not contumacious because "F & H contributed to the error by placing Regan's name on the signs that it posted on the reserved gates" and "by sending faulty telegrams to the Union notifying it of the reserved gate system." Pet. App. 23a-24a. The Master also concluded that while Cecil Atkinson's statement to the F & H official weighed "in favor of a finding of a secondary object" in picketing, Turner's statement did not because it was too ambiguous. *Id.* at 24a-25a, 29a. The Master observed that Local 118's "virtual failure to picket the primary gate" suggested that Local 118's picketing "was really intended to appeal to the neutral parties present during its picketing." *Id.* at 25a-26a, 29a. In addition, Local 118 repeatedly picketed a neutral gate—normally compelling evidence of a secondary object. Nevertheless, the Master discounted that fact in this case because the existence and use of the unannounced and unmarked gate at the back of the project led to an "inference of taint." *Id.* at 26a-29a.

4. The court of appeals disagreed with the Master's report and found petitioners in contempt of the court's order. Pet. App. 1a-10a. The court recognized that the Board had the burden of establishing contempt by "clear and convincing evidence" and that a Master's finding of fact will not be disturbed unless "clearly erroneous." *Id.* at 4a-5a. The court found, however, that there was "no factual or legal support" for the Master's conclusion that the Union's picketing did not violate the court's previous order. *Id.* at 6a.

The court found it unnecessary to reach the issues whether the threats by Local 118 and the picketing

of the neutral gate violated the court order because "if the picketing was directed at a neutral employer for the purpose of pressuring that employer, the picketing violated our Order whether or not separate primary and neutral gates existed or were properly established or maintained." Pet. App. 5a-6a. With respect to the issue whether Local 118 improperly picketed Regan, the court determined, based on the Master's own factual findings, that the conclusions she reached were unsupported by "law or logic" (*id.* at 6a):

> [T]he Special Master concluded that because the general contractor, F & H, had named Regan in its gate sign for the primary gate and in the telegrams to Local 118, NLRB could not complain of picketing directed at Regan * * *. The Special Master's findings make no suggestion that Local 118 was confused on this point. Rather, the Special Master specifically found that Local 118 knew its dispute was with Walker, and the evidence supports that finding. Indeed, Turner sought from the Building Trades Council authority to picket *Walker*, not Regan, and the Special Master found "not credible" Local 118's testimony that it thought its dispute was with Regan.

Ibid. Accordingly, the court found that Local 118 and Turner violated the court order by knowingly picketing Regan, a neutral employer, with a purpose of "pressur[ing] [Regan] to cease using a non-union company." *Ibid.*

The court of appeals directed Local 118 and Turner to refrain from engaging in secondary boycott activity, to mail notices informing members that Local 118 and Turner were adjudged in civil contempt and would take certain actions to remedy their violation of the court's order, to submit a list to the

NLRB setting forth the names and addresses of the individuals to whom such notices were mailed, and to take certain additional steps to assure that future picketing would be lawful. Pet. App. 7a-9a. Specifically, the court of appeals directed petitioners to take the following actions:

> 8. Refrain from authorizing or permitting any of Local 118's members, representatives, or agents to picket unless and until Local 118 has conferred with those members, representatives, or agents and determined that the objects and manner of the proposed picketing are consistent with this Order and this Court's October 27, 1987 Order.
>
> 9. At the outset of any future picketing by Local 118's members, representatives, or agents, Local 118 and Turner shall give each picket a copy of this Order and this Court's October 27, 1987 Order, together with written instructions consistent with the terms of those Orders; and will require all persons assigned to picket line duty to sign a receipt indicating the date on which he or she picketed and that he or she has received, read, understands, and will comply with those Orders; and will submit such acknowledgements to NLRB's Regional Director.

Id. at 9a.

ARGUMENT

1. Petitioners contend (Pet. 5-10) that the court of appeals' remedy for petitioner's contumacious conduct is vague, overly broad, and in violation of the First Amendment. There is no merit to these contentions. As this Court has explained, the "measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief." *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949). Thus, where the "usual remedial provisions" incorporated in an enforced Board order have "proven insufficient" to deter contumacious conduct, " 'stronger medicine' " may be employed. *NLRB* v. *Crown Laundry & Dry Cleaners, Inc.*, 437 F.2d 290, 294 (5th Cir. 1971). Given petitioners' established disregard of the court's previous order, the court of appeals acted well within its powers in imposing additional specific measures to assure future compliance. See Pet. App. 7a-10a.

Petitioners object in particular (Pet. 6-7, 8-9) to paragraphs 8 and 9 of the court's remedy; paragraph 8 requires Local 118 to confer with its members, representatives, and agents to assure that future picketing will be directed at primary employers, and paragraph 9 requires Local 118 to give copies of the court's orders and its instructions to the pickets. It is well settled, however, that "prohibition of inducement or encouragement of secondary pressure * * * carries no constitutional abridgement of free speech." *International Brotherhood of Electrical Workers* v. *NLRB*, 341 U.S. 694, 705 (1951). Paragraphs 8 and 9, which seek to ensure that the pickets fully understand their obligations on the picket line and are aware of potential sanctions for misconduct, are clearly appropriate measures to assure future compliance with the court's previous order.

Petitioners mistakenly contend (Pet. 6) that paragraph 9 requires that the Board be advised of picketing before it occurs. Rather, that paragraph, by its plain terms, requires that petitioners furnish the Board's Regional Office with evidence of compliance with the court's order only *after* the picketing has commenced. See Pet. App. 9a. Petitioners are also mistaken in contending (Pet. 8-9) that paragraph 9, which requires that the pickets certify that they have received, read, and understood the court's orders, prevents non-literate or non-English speaking pickets from participating on picket lines. Plainly, the court of appeals imposed that requirement to assure that pickets are informed of the consequences of their actions and not to exclude non-literate or non-English speaking pickets. Petitioners cannot seriously suggest that the Board or the court of appeals would consider petitioners in violation of the court's requirement if the union read the instructions and orders to any such pickets in their language and obtained equivalent certification from them. Cf. *United States* v. *Rylander*, 460 U.S. 752, 757 (1983).

2. Petitioners also contend (Pet. 11-16) that the court of appeals' order has infringed their right to freedom of association. They point specifically to paragraph 4, which requires that petitioners "sign, duplicate, and mail at their own expense, copies of this Order and the Notice to all members of Local 118, and submit a list of those members, officers, agents and representatives, and their addresses to the NLRB Regional Director" (Pet. App. 8a). Petitioners' challenge to that paragraph, however, is now moot. On November 9, 1990, Local 118 complied with paragraph 4's requirements by mailing Board

notices to its members and furnishing the Board a computerized list of the names and addresses of the persons to whom the notices were sent. See App., *infra* (Certificate re Compliance).

In any event, the Board cannot assure compliance with the mailing requirements of the court's order without the names and addresses of the recipients. The Board's (and the court's) interest in assuring that Local 118's members are informed of the court's decision is sufficient to override Local 118's concern for the privacy rights of its members. See *NAACP* v. *Alabama*, 357 U.S. 449, 464 (1958). Cf. *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969) (upholding the Board's right to obtain employee names and addresses in furtherance of its legitimate statutory purpose of conducting fair elections).

3. Petitioners also contend (Pet. 19-21) that the court of appeals applied an improper standard of review to the Special Master's findings. As we have explained (p. 5, *supra*), the court expressly applied the "clearly erroneous" standard in reviewing the Master's factual findings and recognized that the Board had the burden of proving contempt by "clear and convincing" evidence. The court did not "mischaracterize[]" (Pet. 16) the Master's findings or "impl[y]" (Pet. 19) the necessary nexus to establish contumacious conduct. Rather, the court relied on the Master's own findings of fact to overturn her conclusion that an improper objective in picketing was not established. The court made that determination under the well-recognized principle that a reviewing court can reverse factual findings if the court "is left with the definite and firm conviction that a mistake has been committed." Pet. App. 4a, citing *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573 (1985).

As the court of appeals recognized, the touchstone in any secondary boycott case involving picketing is a determination of the union's objective in picketing. See Pet. App. 5a-6a. If *one* of the objectives of the union's picketing is to cause a neutral employer to cease doing business with a primary employer, a violation is shown even if that is not the *sole* objective of the union's action. *NLRB* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 689 (1951). Based on the Special Master's findings, the court of appeals concluded that petitioners knew that Regan was a neutral employer and nevertheless picketed the job site with signs identifying Regan as the employer with which it had a dispute in order to put pressure on Regan. Pet. App. 5a-6a. Petitioners' assertion (Pet. 17-19) that they had reason to believe that Regan was a primary employer raises only a factual issue that does not warrant review by this Court.*

---

* Petitioners assert that the court of appeals "mechanically applied" the criteria set forth in *In re Sailors' Union of the Pacific (Moore Dry Dock)*, 92 N.L.R.B. 547, 549 (1950), to determine that petitioners engaged in contumacious conduct. Pet. 16-17, 19. The court, however, did not find petitioners' picketing contumacious simply because of a "technical violation" (Pet. 16) of the *Moore Dry Dock* criteria. Rather, the court concluded, based on other evidence, that petitioners knew that Walker, not Regan, was the primary employer. Pet. App. 6a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Acting Deputy General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

STANLEY R. ZIRKIN
Deputy Assistant General Counsel
National Labor Relations Board

FEBRUARY 1991

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No: 87-7222

NLRB Nos: 32-CC-1101 and 32-CC-1107

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

IRON WORKERS LOCAL 118, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, RESPONDENT

and

WALT TURNER, ADDITIONAL RESPONDENT IN CONTEMPT

CERTIFICATE OF A.R. (MICK) MYNSTED
RE: COMPLIANCE MAILINGS

I, A.R. (Mick) Mynsted, hereby declare as follows:

1. I am the Business Manager, Financial Secretary-Treasurer of Iron Workers Local Union No. 118. As such, I am in a position to have knowledge of the mailings made by said Local 118 in Compliance with the Order filed herein on July 26, 1990.

2. Local 118 has mailed a copy of the Order in this action, filed July 26, 1990, and a copy of the Notice to all of its members, officers, agents and representatives, as required by the Order filed July 26, 1990 in this action.

3. Said mailing was made at 10:00 a.m. on November 9, 1990 from the Main Post Office at Sacramento, California.

4. Attached hereto as "Exhibit A" and incorporated by reference, is a copy of the members, officers, agents and representatives and their addresses to whom said mailings were made.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Sacramento, California this 19th day of November, 1990.

/s/ A.R. Mick Mynsted
A.R. (MICK) MYNSTED

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20390